

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)

Preemption of State and Local Zoning and)
Land Use Restrictions on the Siting)
Placement and Construction of Broadcast)
Station Transmission Facilities)

MM Docket No. 97-182

To: The Commission

**JOINT COMMENTS OF PAXSON COMMUNICATIONS CORPORATION,
COX BROADCASTING, INC. AND MEDIA GENERAL, INC.**

Paxson Communications Corporation ("PCC"), Cox Broadcasting, Inc. ("Cox"), and Media General, Inc. ("Media General") (collectively, the "Joint Commentors"), by their attorneys, hereby submit the following comments in response to the Commission's Notice of Proposed Rule Making regarding the above-referenced proceeding.^{1/} The NPRM seeks comments on the petition filed jointly by the National Association of Broadcasters and the Association of Maximum Service Television ("Petitioners") and related matters concerning the scope of any preemption of state and local laws in light of the Commission's commitment to a rapid roll-out of digital television ("DTV").^{2/} The Joint Commentors support the

^{1/} *Preemption of State and Local Zoning and Land Use Restrictions*, Notice of Proposed Rule Making, rel. Aug. 19, 1997 (the "NPRM").

^{2/} *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fifth Report and Order, MM Docket No. 87-268, 7 CR 863 (Apr. 22, 1997).

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Petitioners and urge the Commission to establish reasonable timetables for local and state government processing of siting and construction applications.

I. Introduction

PCC has assembled an extensive nationwide broadcast television group in anticipation of the launch of the seventh broadcasting network. With pending acquisitions, PCC, the largest owner of full-power broadcast television stations in the U.S., owns, operates or affiliates with 62 full-power television stations in markets containing over 58.9 million television households (60% of all U.S. television households). Including all announced acquisitions, PCC's television group owns, operates and affiliates with stations in almost all of the largest television markets with the overwhelming majority of the stations being UHF facilities. It is PCC's stated strategy to expand its nationwide broadcast television network into each of the top 50 U.S. television markets and to extend its distribution system to reach 70% of the U.S. television households.

PCC's television group currently broadcasts long-form paid programming, including local merchant and national consumer product advertising, as well as selected political, religious, and ethnic programs. Discussions with regard to niche or mainstream programming alternatives for broadcast over PCC's distribution system are continuing with major broadcast television networks, Hollywood television and movie studios, television programming syndicators, and cable network programmers with a view to creating the nation's seventh over-the-air broadcast network. A rapid roll-out of DTV is essential to the creation and success of this new television network.

Cox Broadcasting's subsidiaries are the licensees of nine television stations located throughout the country.

Media General is the licensee of sixteen television stations, all but one of which are located in the southeast United States. The stations run the gamut from VHF to UHF, from small market to large market, and from flat terrain to Appalachian country. Several of the stations employ TV translators to provide improved coverage in service.

II. The Commission Should Adopt Petitioners' Proposed Rule in its Entirety

The Commission is dedicated to accelerating the introduction of this important DTV service to the American public. Broadcasters face a variety of hurdles, however, if they are to satisfy the Commission's mandated DTV construction schedule: engineering and technical obstacles, significant capital requirements and capacity limitations of the tower construction and broadcast equipment industries. Given the number of market-oriented challenges faced by broadcasters as they attempt to transition to DTV, the Joint Commentors agree with the Petitioners that the Commission should preempt state and local regulations to the extent they unreasonably prohibit or delay the DTV roll-out and other ongoing broadcast transmission facilities construction.

The Joint Commentors recognize that state and local governments have legitimate interests in protecting their communities and citizens and that the federal government should show restraint in the exercise of preemption power. However, state and local governments have no reasonable interest in not processing construction and land use applications in a timely fashion. Similarly, state and local governments should not thwart well-considered federal policies in areas of environmental and health effects of RF emission, RF interference

and FAA tower markings. Accordingly, the Joint Commentors agree with the rule proposed by Petitioners and urges the Commission to adopt it in its entirety. The rule would allow the FCC to preempt those local regulations that interfere with the federal regulatory schemes. The proposal prevents the ability of local authorities to deny broadcaster applications based upon grounds of RF emissions or tower marking. The proposal also establishes procedural timetables within which state and local governments must either act or the broadcaster application will be deemed granted. The rule promotes the timely processing of construction and land use applications, prevents state and local governments from denying applications based on unreasonable grounds and protects the legitimate interests of communities and citizens. Yet the proposed rule correctly restricts federal powers by creating a conditional exercise of preemption and balancing properly the interests of all parties. The Commission should adopt the Petitioners' well-considered rule.

III. The Twenty-One Day Processing Period for Certain Modifications is Reasonable

Television technical modifications that do not change the location or nominal height of an existing broadcast tower should trigger few new issues of concern to state and local governments. The rule proposed by Petitioners would have state and local governments act within twenty-one days upon receipt of broadcaster applications for the modification of an existing tower where there is no change in location or overall height or for strengthening or replacing an existing broadcast transmission facility. Under these circumstances, with few (if any) new concerns raised by the proposed limited modification, state and local governments would have little justification to delay the processing of broadcaster

applications. Three weeks is more than a sufficient amount of time for officials to review these types of proposed modifications.

The Joint Commentors propose that, in addition to the two limited cases above, a third type of modification be treated under the twenty-one day timetable: a minor change in the overall height of the tower. The Joint Commentors believe that tower height modifications resulting in increased height of six feet or less would raise no additional issues of concern to state and local governments and thus would warrant the same expedited review. Minor changes in tower height hardly deserve to impede the roll-out of DTV service.

IV. Aesthetics Should Not Be Used to Prohibit Modifications to Existing Facilities

The Commission should announce clearly that it will preempt state and local governments from prohibiting broadcasters from modifying their *existing* facilities solely on the basis of aesthetic qualities. While the Joint Commentors understand that local governments are often better situated than the Commission in resolving aesthetic issues, modification of a tower that is already in existence should raise no new aesthetic issue to be addressed. In general, the Joint Commentors are concerned that some local governments may be tempted to use amorphous aesthetic standards as an unreasonable pretext for thwarting broadcaster construction efforts. The Commission should constrain the potential for this kind of opportunism by preempting local governments in those instances where broadcasters only seek to modify existing facilities. These modifications have no real visual effect — whether it is a small change in tower height or increased structural support — and should not open the door to new rounds of procedures and hearings over aesthetic standards. In light of the importance of bringing the new DTV service to the public, the interest of

taxpayers in the accelerated recovery of broadcast spectrum and the limited application to existing facilities, the Joint Commentors' proposal would be a reasonable exercise of restricted federal preemption power.

V. Additional Concerns

The Joint Commentors wish to highlight the importance of the Petitioners' proposal to preempt state and local governments from denying tower construction or modification applications on the basis of environmental or health effects of RF emissions, to the extent that facilities otherwise comply with Commission regulations. The Commission has engaged in extensive research in this area and has sufficiently protected the public by establishing uniform RF emission and tower fencing standards. It is unlikely that state and local governments have the expertise or thorough record that would justify the imposition of, or a debate over, heightened RF emission requirements. The Commission is as dedicated to protecting the public's safety as state and local governments. Accordingly, the Commission's expertise should be given deference.

The Commission should clearly indicate that transmitter buildings are considered "broadcast transmission facilities" for the purposes of the proposed rule. Many transmitter buildings will likely be expanded as stations alter their facilities for the dual broadcasting required during the DTV transition period. For these simple structures, local authorities should be prevented from delaying modifications or construction for DTV facilities.

The Commission should adopt a "reasonable relation" guideline for zoning processing fees. Broadcasters face enormous financial pressures as they attempt to abide by the accelerated DTV construction schedule. The Commission has already stated that deadline

extensions will not be granted on the basis of cost of equipment.^{3/} Given these financial constraints, state and local governments should be preempted from assessing unreasonable fees (*i.e.*, taxes) for the processing of applications. For example, processing fees set at 10% of construction costs should be preempted as an unreasonable exercise of local power. To preempt certain powers of local authorities without preventing their ability to assess unreasonable processing fees will simply allow state and local governments to prohibit indirectly the construction and modification of antenna towers.

The Commission has gone to great lengths to facilitate the accelerated build-out of DTV. Bringing this new service to the public as quickly as possible is an important policy goal which nevertheless carries a high cost for many parties, especially broadcasters. The rapid recovery of broadcast spectrum for subsequent auction will benefit taxpayers and promote new technologies and services. Accordingly, limiting the application of preemption powers to “top markets” will not further the public’s interest in a rapid DTV roll-out for the remainder of the population. The Commission should apply Petitioners’ proposed rule to the entire country and not just to those markets facing the earliest construction deadlines. Indeed, the Joint Commentors expect that the variety of construction obstacles will be most troublesome for the smaller markets where limited budgets and tower construction capacity will take their toll. For similar reasons, the Commission should apply preemption powers to all towers on which broadcast television equipment can be placed.

Indeed, in response to the Commission’s request for comments on the scope of the proposed preemption, the Joint Commentors ask the Commission to apply its preemption

^{3/} *Fifth Report and Order* at ¶77.

powers as proposed to *all* services and not just broadcast. For example, the Commission has before it a long-standing petition requesting federal preemption of siting and zoning regulation in CMRS.^{4/} The Commission should take this opportunity to promulgate preemption procedures which are applicable to broadcast and other services where requests for preemption have been submitted and refrain from engaging in affirmative discrimination between services. The broad application of a restricted and reasonable use of federal preemption power will best further the public's interest in the deployment of new services.

For the foregoing reasons, the Joint Commentors respectfully urge the Commission to adopt the Petitioners' proposal, along with the additional proposals offered herein.

Respectfully submitted,

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^{4/} See *Supplemental Pleading Cycle Established for Comments on Petition for Declaratory Ruling of the Cellular Telecommunications Industry Association*, Public Notice, DA 96-2140, rel. July 28, 1997; *CTIA Petition for Declaratory Ruling*, filed Dec. 16, 1996.